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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 491

CORLISS LAMONT, DOING BUSINESS AS BASIC PAMPHLETS,

Appellant,

—v.—

THE POSTMASTER GENERAL OF THE UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

NANETTE DEMBITZ

MELVIN L. WULF

156 Fifth Avenue

New York 10, N. Y.

Attorneys for Amicus Curiae

INDEX

	PAGE
Interest of <i>Amicus</i>	1
ARGUMENT	2
1. Statutory Provision Applied in <i>McReynolds</i>	2
2. Forms of Interference With First Amendment Rights	3
Administrative Methods	4
3. What Is "Communist Political Propaganda"— the Post Office's Area of Discretion	5
4. Lack of Justification for Statute	6
CONCLUSION	7
APPENDIX:	
Letter Dated March 8, 1965	9-10
Letter Dated December 31, 1963	11-14

TABLE OF AUTHORITIES:

Cases:

American Communications Ass'n v. Douds, 339 U. S. 382	3-4
Burstyn v. Wilson, 343 U. S. 495	6
Louisiana v. NAACP, 366 U. S. 293	3

Manual Enterprises v. Day, 370 U. S. 478	6
McReynolds and Pappenheim v. Christenberry et al., S. D. N. Y., No. 63, Civ. 3648, appeal pending	1, 2, 6
Roth v. United States, 354 U. S. 476	6
Speiser v. Randall, 357 U. S. 513	6
United States v. Oregon Medical Society, 343 U. S. 326	4
Walling v. Helmerich & Payne, 323 U. S. 37	4
Watkins v. United States, 354 U. S. 178	3

Constitution:

First Amendment	2, 3, 4, 5, 6, 7
Fifth Amendment	2, 6

Statutes:

39 U. S. C. §4008	2
22 U. S. C. §611(j)	5

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Interest of Amicus

The American Civil Liberties Union is appearing as *amicus*, with consent of the parties, not only because of its general concern with the free communication of ideas. It has an additional and particular interest in the cases at bar because the undersigned counsel represent, on behalf of the Union, the plaintiffs in an action in which the complaint was dismissed largely on the basis of the three-judge court's decision in *Lamont*. (*McReynolds and Pappenheim v. Christenberry et al.*, S. D. N. Y., No. 63, Civ. 3648, appeal pending; pet. for cert. before judg. den. by this Court, Jan. 18, 1965.)

ARGUMENT

1. Statutory Provision Applied in *McReynolds*

The *McReynolds* complaint highlights an important aspect of the statute regulating "communist political propaganda" in the mails [39 U. S. C. §4008], besides those apparent in the cases at bar.

Plaintiff Pappenheim, a sociologist, had purchased a number of books and pamphlets at a New York bookstore in December 1963. They were mailed by the bookstore to his residence in Cambridge, Massachusetts, the return address on the package being that of the bookstore. The Post Office detained the package, and sent him the "communist political propaganda" notification. After two letters from Dr. Pappenheim to the Post Office, he received in Cambridge on March 6th the package of books purchased and mailed from New York in December.¹

Thus, Dr. Pappenheim's complaint arose solely under the statutory provision for detention of "mail . . . which originates . . . in a foreign country . . . upon its subsequent deposit in the United States domestic mail." While the course of the litigation averted a determination of the extent of detention and political labeling of domestic mail, Dr. Pappenheim's complaint illustrates the potential of the Post Office's statutory authority. Contrary to the Government's suggestion in the cases at bar (Govt. Br., p. 12), the statute covers not only foreign senders but also senders of mail who are undoubtedly entitled to the protections of the First and Fifth Amendments.

¹ As in the cases at bar, the Government moved to dismiss Dr. Pappenheim's complaint on grounds of mootness, on the basis of the delivery of the mail and a letter from the Post Office promising him future deliveries.

2. Forms of Interference With First Amendment Rights

Basically and ineradicably, regardless of varying administrative methods, the statute requires Government determination of whether printed matter is "Communist political propaganda"; interruption and delay in its transmission; and some type of written affirmation by an addressee of his desire to receive the material thus categorized by the Government. This Court has repeatedly recognized coercion of a constitutional dimension in government exposure of an individual in a light the community regards as opprobrious (e.g., *Louisiana v. NAACP*, 366 U. S. 293, 295-6; *Watkins v. United States*, 354 U. S. 178, 197-8). Here the Government itself affixes an opprobrious stamp—"communist political propaganda". The Government thus interferes with the First Amendment right to read, for individuals will tend to fear acknowledging to the disapproving Government their interest in the disparaged reading matter, and will tend to avoid contact with ideas so insidious that they require Government labeling.

Government interference with the reception of reading matter of course also curtails the rights of expression and dissemination of publishers and senders. Indeed, there is some deterrence to those wishing to disseminate ideas in print—and the cost of doing so by means other than unsealed mail may be prohibitive—in the mere knowledge of the Government's concern with the transmission of "communist political propaganda." Further, the Government labeling interferes with the free play of reason of those addressees who eventually receive the "communist political propaganda." This Government grading of political content will tend to guide the individual's thinking, contrary to the precept that "It is not the function of our Government to keep the citizen from falling into error." (*Ameri-*

can Communications Ass'n v. Douds, 339 U. S. 382, 442 (Jackson, J. concurring in part).)

Administrative Methods

We have described the minimum interferences required by the statute. The methods of administering it are at this writing uncertain. Until a month ago, the Post Office kept a record of addressees requesting delivery of "communist political propaganda." Apparently to modify the constitutional problem posed by the statute, the Post Office now destroys such records (Govt. Br., pp. 37-39).

This Court can hardly judge the statute's impact on First Amendment rights on the basis of the past month's declared practice. Compare *Walling v. Helmerich & Payne*, 323 U. S. 37, 43; *United States v. Oregon Medical Society*, 343 U. S. 326, 333. The present policy, announced only in the form of a Post Office Department Regional Letter, has none of the hallmarks of permanence and stability. Practice under the previous purported policy was wavering and inconsistent (see Appendix, *infra*, p. 9); and the current announcement leaves many problems unsettled.

Apparently if an addressee once notifies the Post Office not to deliver mail or once fails to return a card, he will no longer receive any "communist political propaganda" or notification about it (Govt. Br., p. 5, n. 4)—this regardless of whether his silence is inadvertent due to the time of the card's receipt or even its miscarriage in the mail. Thus, some members of the American Association for the Advancement of Slavic Studies² complained about the short

² As a result of the filing of suit for Dr. Pappenheim, undersigned counsel received a letter from the President of the American Association for the Advancement of Slavic Studies, Professor Joseph S. Berliner of Brandeis University, stating that the "Asso-

deadline for the return of notices, especially during vacations. In any event, individuals will be cut off from a wide variety of reading-matter (see Section 3 below), without any awareness of the scope of their deprivation or the nature of particular items. Further, despite the statutory exception for subscriptions, members of the American Association found that subscription copies were detained (*infra*, p. 13). It is unclear whether the Post Office maintains lists of those subscribers it considers bona fide, thus continuing the evils of Government listing of people interested in "communist political propaganda."

3. What Is "Communist Political Propaganda"— the Post Office's Area of Discretion

How wide an area of expression is affected by the expansible interference with First Amendment rights permitted under the statute? The phrase "political propaganda" perhaps has, as the Government states, a readily understood meaning (Govt. Br., p. 26)—it probably connotes in popular usage an exaggerated or biased presentation for the sake of advocacy. The statute at bar, however, incorporates the definition of "political propaganda" provided in the Foreign Agents Registration Act (22 U. S. C. 611(j)), which is much broader than the popular meaning. Under that Act the term includes even a factual, objective, and unbiased statement about a foreign country or foreign political party or the foreign policies of the United States.

The Government's brief (p. 24) stresses that propaganda is subject to the statute only if it is issued "by or on be-

ciation has long been interested in the legislation dealing with the confiscation of 'subversive' literature, much of which constitutes the stock in trade of our scholarly research efforts." Professor Berliner enclosed a memorandum summarizing an Association survey of its membership as to the effect of the statute, which appears in the Appendix, *infra*, p. 11.

half" of the 29-odd countries to which the statute is being applied. However, the mail detained in *McReynolds and Pappenheim v. Christenberry*, and also apparently in the cases at bar, was not ostensibly issued by or on behalf of a foreign country. The Post Office and the Customs Bureau assume authority to determine when mail originating in an included country, should be deemed issued on its behalf, without any proof or evidence to this effect. Thus, employees of these Departments have arbitrary discretion in a broad area of expression to interfere when they wish. Such capricious control in the area of expression offends the First and Fifth Amendments, even though, as the Government argues (Br., pp. 24-25), no penal sanction is imposed. See *Burstyn v. Wilson*, 343 U. S. 495, 504-506.

4. Lack of Justification for Statute

First Amendment freedoms are highly vulnerable and fragile (see *Speiser v. Randall*, 357 U. S. 513, 525), and any impediment to communication on political subjects interferes with the Amendment's primary purpose (*Roth v. United States*, 354 U. S. 476, 484). The fear of ideas implicit in and instilled by official concern with receipt of "communist political propaganda," is antithetical to the free debate of ideas. The Government's interest in protecting some individuals from the annoyance of receiving unwanted mail from abroad (Govt. Br., pp. 16-17), is insufficient to warrant its interference with free expression.* Furthermore, this protection could be accomplished without labeling the items which might be unwanted as "communist

* The fact that unsealed printed matter is carried at less than cost (Govt. Br., p. 19) does not of course justify its treatment in a manner interfering with First Amendment rights (see *Manual Enterprises v. Day*, 370 U. S. 478).

political propaganda"; the alleged objective could be accomplished without as great an interference with First Amendment rights.

CONCLUSION

It is respectfully submitted that the judgment in No. 491 should be reversed and in No. 848 affirmed.

Respectfully submitted,

NANETTE DEMBITZ

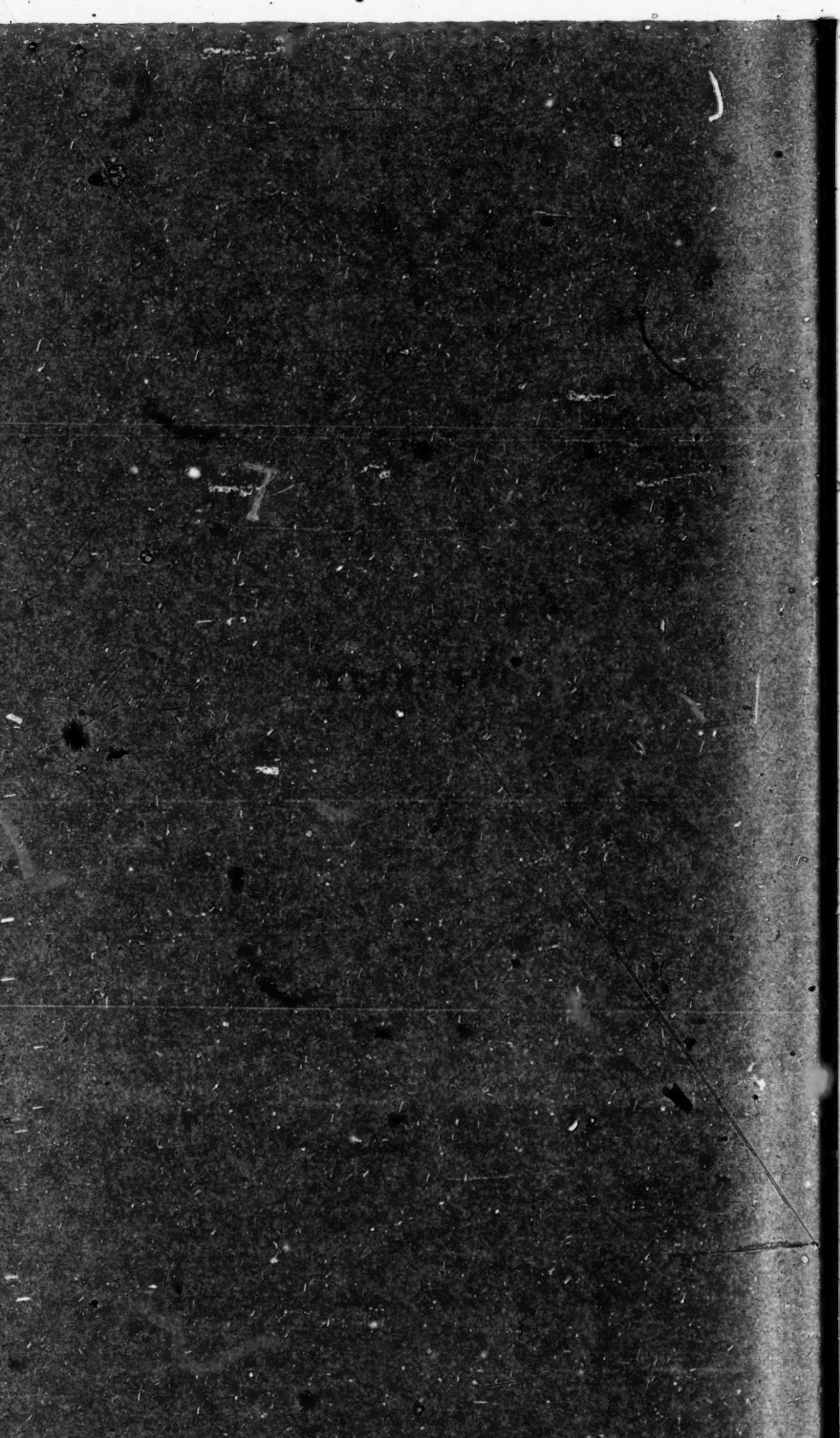
MELVIN L. WULF

156 Fifth Avenue

New York 10, N. Y.

Attorneys for Amicus Curiae

April, 1965



APPENDIX

.168-14 127th Avenue
Jamaica, New York 11434
March 8, 1965

The Postmaster General
U. S. Post Office
Washington, D. C.

Dear Sir:

Re: Public Law 87-793

I am a professional anthropologist (Ph.D., Columbia University) and, as my dossier will indicate, I subscribe to various literary, scientific, and political journals which are published in Communist countries.

Several years ago I wrote a letter of protest about the Public Law noted above to the then Postmaster General, Mr. Day. I wished not only to let Mr. Day know my opinion of this Law, but also to request that the Postmasters of the several ports of entry for foreign mail be advised that I wish to receive *all* mail, solicited or not, which is addressed to me.

After an exchange of letters on this subject between myself and Tyler Abell, Esq.; of your Department, my request was granted.

In the several years which have elapsed, I have received more than a few of the . . . post cards from the POD's Foreign Propaganda Units in various parts of the country.

On several occasions, unfortunately, my reply card either went astray or is pending action in some lost file; and I did not receive the books and periodicals in question. . . .

Letter Dated March 8, 1965

I have this date received another such note from the Postmaster in San Francisco, Foreign Propaganda Unit, 395 Beale Street, Room 271. I am advised that a magazine published in Hong Kong, EASTERN HORIZON, issue no. 2, 1965 . . . will be destroyed if I do not reply by March 26th. I replied at once, indicating that I wish to receive this magazine (and similar publications).

. . . I should respectfully appreciate your advising the people in San Francisco of my wishes—namely, to receive my mail promptly and without loss. . . They were so advised by Mr. Abell some years ago but seem to have forgotten.

Respectfully yours,

S. H. POSINSKY

AMERICAN ASSOCIATION FOR THE
ADVANCEMENT OF SLAVIC STUDIES*

112 Davenport House University of Illinois
Champaign, Illinois

December 31, 1963

Memo to: Officers and other Members of the Board

From: Ralph Fisher

Subject: Responses to questionnaire about delivery of
"Communist propaganda."

Early in December, as you will recall; the regular members of the Association were sent the following inquiry:

Dear Member:

At its recent meeting in New York, the Board of the Triple A Double S took note of a New York Times story of October 24 which reported in part as follows:

* Board of Directors—1964.

Elected at large: John A. Armstrong, Joseph S. Berliner, Alexander Dallin, Victor Erlich, Franklyn D. Holzman, Gleb Struve.

Representing organizations: Robert C. Tucker (Political Science), Donald W. Treadgold (JCSS), Edward J. Brown (Language and Literature), Holland Hunter (Economics), George Kish (Geography), Robert F. Byrnes (History).

Officers—1964.

President: Joseph S. Berliner, Department of Economics, Brandeis University, Waltham 54, Mass.; Vice President: John A. Armstrong, Department of Political Science, University of Wisconsin, Madison 6, Wisconsin; Secretary: Ralph T. Fisher, Jr., 112 Davenport House, University of Illinois, Champaign, Ill.; Treasurer: John N. Hazard, 431 West 117th St., Columbia University, New York 27, N. Y.; Managing Editor of the Slavic Review: Donald W. Treadgold, 508 Thomson Hall, University of Washington, Seattle 5, Wash.

Letter Dated December 31, 1963

'Under a law passed by Congress last January, the Post Office has been delaying the delivery of what it judges to be Communist propaganda mailed from foreign countries. In many cases this mail is unsolicited.

'Addressees are notified that the material is being held. They may have it delivered by filling out a form.'

Members of the Board wondered to what extent specialists in the field have in fact been experiencing any obstacles to the normal delivery of materials from Soviet-bloc sources. The Board decided to send out this informal inquiry in the next general mailing. Your reply will aid the Board in deciding whether any action is desirable on its part. Please mail the lower portion of this sheet back with your proxy.

The lower part of the sheet provided space for checking either "I have experienced no obstacles to delivery of materials from Soviet-bloc sources," or "I have experienced obstacles." If he checked the latter, the respondent was asked to "explain what the difficulties were, what action you took, and what was the result."

A total of some 291 replies was received. Of these, 212 simply indicated that they had experienced no obstacles, and let it go at that.

Of the remaining 79, about half had also experienced no obstacles, but wished to make some comment anyway. Several people observed (as many of the above 212 probably could have) that the reason they experienced no difficulties was that they did not receive materials from the Soviet bloc anyway. Six persons indicated that they knew of

Letter Dated December 31, 1963

others whose mail was held up. Two of these remarked that they knew of people who had been afraid to send in the form saying that they wanted the material in question, and had thus foregone receiving it.

About forty of our members reported having had their mail held up. Thirty-three of these said that after they notified the postal authorities that they wanted to receive all such material, they had had no further trouble. Three, however, said they had had repeated clashes with the postal authorities, even after making their positions clear.

Although our questionnaire did not ask specifically about the use of home as opposed to university or institutional addresses, four persons volunteered the information that the materials held up were addressed to their homes. Some suggested that the use of an institutional address would eliminate interference by the postal authorities, but at least one person had also had mail held up which was addressed to his office.

Four persons complained that they had found the post office's deadline for replies was set too early to allow time for the forwarding of the notice, especially during vacations. This meant that by the time the addressee returned the form saying he wanted the publication, it had already been destroyed.

One justification for the law has been the alleged need of protecting the unwary American citizen from a barrage of unsolicited propaganda from abroad. But the way the law is being administered casts doubt upon this explanation, for twenty-two of our members reported that the materials that were held up were *subscription* copies. This seems deserving of special note.

Letter Dated December 31, 1963

A sentiment made explicit by fourteen persons and implicit in the remarks of many others was that the Association should do something about repealing the law.

• • • • •

Sincerely,

/s/ RALPH

Ralph T. Fisher, Jr.

Secretary

